

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:F:BOS:POSTF-119560-02
BJLaterman

date:

7/26/02

to: Susan Daly, Team Manager,
Group 1472: Natural Resources

from: Associate Area Counsel, Boston
CC:LM:FS:BOS

in re: [REDACTED] and Affiliated Corporations
Form 872
Taxable Year [REDACTED]

This is in response to your request of March 26, 2002 that we provide advice regarding extending the statute of limitations for the above-mentioned consolidated group's [REDACTED] taxable year. This memorandum should not be cited as precedent.

[REDACTED], formerly a Massachusetts business trust, was incorporated on [REDACTED]. It filed a consolidated corporate return (Form 1120) for the year [REDACTED] in the name of [REDACTED] and Affiliates Corporations, using EIN [REDACTED]. Page 1 of the [REDACTED] return indicates that it is a consolidated return and there is a schedule of affiliated corporations attached to the return. The statute of limitations for the [REDACTED] year will expire on [REDACTED]. The description of transactions set forth below is based on the merger agreements and merger certificates (previously provided to our office) and your memorandum of March 26, 2002.

An Agreement and Plan of Merger ("Agreement") dated as of [REDACTED] was entered into by [REDACTED] ("[REDACTED]"), a Massachusetts business trust with EIN [REDACTED]; [REDACTED], a Massachusetts business trust; and [REDACTED] LLC, a Massachusetts limited liability company which was directly and wholly owned by [REDACTED] with EIN [REDACTED]. The Agreement and Plan of Merger provided that [REDACTED] LLC would be merged with and into [REDACTED] with [REDACTED] surviving the merger. A Certificate of Merger (dated [REDACTED]) indicates that [REDACTED] would continue to use EIN [REDACTED]. As a result of the merger, it was contemplated that [REDACTED] would own, directly or indirectly, all of the issued and outstanding common shares of [REDACTED]. The Agreement also provided that it was governed by and would be construed in accordance with Massachusetts law.

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The transactions contemplated by the Agreement and Plan of Merger dated [REDACTED] occurred on [REDACTED]. However on [REDACTED], [REDACTED] was acquired by [REDACTED], a public limited liability company incorporated under the laws of [REDACTED] and [REDACTED]. This acquisition was pursuant to an Agreement and Plan of Merger dated as of [REDACTED] by and among The [REDACTED] LLC (formerly known as [REDACTED] LLC) and [REDACTED] LLC (formerly known as [REDACTED] LLC) was a Massachusetts limited liability company formed on [REDACTED], which was directly and indirectly owned by [REDACTED], solely for the purpose of the acquisition of [REDACTED].

As a result of the initial merger transaction of [REDACTED], provided in the Agreement and Plan of Merger dated [REDACTED], [REDACTED] became the owner, directly or indirectly, of all the issued and outstanding common shares of [REDACTED]. This was accomplished through the merger of [REDACTED] LLC with and into [REDACTED]. [REDACTED] survived the merger. The Certification of Merger states that [REDACTED] would continue to use its EIN. The merger occurred pursuant to M.G.L. ch. 182 § 2 and M.G.L. ch. 156c § 59. Agreement, sec. 1.01.

As the result of other transactions on [REDACTED], [REDACTED] was no longer in existence after [REDACTED]. A second merger occurred on [REDACTED] (pursuant to an Agreement of Merger dated [REDACTED]) whereby [REDACTED] merged into [REDACTED], a Massachusetts limited liability company, directly or indirectly wholly owned by [REDACTED]. [REDACTED] survived the merger. A third merger occurred on [REDACTED] (pursuant to an Agreement of Merger dated [REDACTED]) whereby [REDACTED] merged with and into [REDACTED], Inc. Said corporation was a Delaware corporation organized on [REDACTED] which was a member of the [REDACTED]. [REDACTED], Inc. was the survivor of the merger. After the merger, [REDACTED], Inc., as of [REDACTED], changed its name to [REDACTED].

The parent of [REDACTED] is [REDACTED], which was formed on [REDACTED]. [REDACTED] is owned by [REDACTED]. As a result of the merger transactions set forth above (which occurred on [REDACTED]), the subsidiaries of [REDACTED] are now subsidiaries of [REDACTED].

On [REDACTED], according to a Certificate of Merger, [REDACTED] LLC merged with and into [REDACTED] pursuant to the Agreement and Plan of Merger dated [REDACTED] between [REDACTED] and [REDACTED] LLC. The merger occurred pursuant to M.G.L. ch. 182 § 2 and M.G.L. ch. 156c § 59. Agreement Article I, sec. 1.01. [REDACTED] was the surviving corporation.

Thereafter, a second merger was effectuated pursuant to an Agreement of Merger dated [REDACTED] ("Second Agreement"). Under the Second Agreement, [REDACTED] (EIN [REDACTED]) merged with and into [REDACTED] (" [REDACTED] ") (EIN [REDACTED]), a Massachusetts limited liability company organized on [REDACTED]. [REDACTED] survived the merger and continued to use the EIN [REDACTED].

The Second Agreement stated that the merger of [REDACTED] with and into [REDACTED] was pursuant to the Massachusetts Limited Liability Company Act, M.G.L. ch. 156C §59, and M.G.L. ch. 182 §2. The Second Agreement stated that this merger was intended to qualify as a reorganization within the meaning of I.R.C. §368(a)(1)(F), i.e., a mere change in identity, form, or place of organization of one corporation, however effected. Agreement of Merger, [REDACTED] paragraph. The separate existence of [REDACTED] ceased, except insofar as it might be continued in law or in order to carry out the purposes of the Second Agreement and except as continued in [REDACTED]. Under the terms of the Second Agreement, [REDACTED] succeeded to the obligations of [REDACTED], and all debts, liabilities, and duties of [REDACTED] attached to [REDACTED].¹ Agreement of Merger, par. [REDACTED].

In this transaction, the outstanding equity of [REDACTED] was converted into membership interests in [REDACTED]. Each limited liability company membership interest in [REDACTED] issued and outstanding in the name of [REDACTED] and each common share of [REDACTED] outstanding on the effective date of the merger was canceled and retired as of the effective date. Agreement of Merger, par. [REDACTED], and [REDACTED].

A third merger was effectuated pursuant to an Agreement of Merger dated [REDACTED] ("Third Agreement"). Under the Third Agreement, [REDACTED] (EIN [REDACTED]) was merged with and into [REDACTED] (EIN [REDACTED]). [REDACTED] survived the merger and continued to use the EIN [REDACTED].

The Third Agreement stated that the merger of [REDACTED] into [REDACTED] was in accordance with the applicable provisions of the Massachusetts Limited Liability Company Act,

¹To qualify as a I.R.C. §368(a)(1)(F) reorganization, one of the merged corporations would have to be a non-operating company. We assume for purposes of this advice that this requirement is satisfied based on information provided, because [REDACTED] appears to be a non-operating company organized for the sole purpose of merging with [REDACTED].

M.G.L. ch. 156C § 59, and the Delaware General Corporation Law, 8 Del. C. § 264(1999).

In the Third Agreement, the outstanding equity of the constituent entities, [REDACTED] and [REDACTED] was converted into shares of [REDACTED]. Each limited liability company membership interest in [REDACTED] was canceled. Each share of [REDACTED] issued and outstanding in the name of [REDACTED] was canceled, but each share issued and outstanding in the name of any third person or entity other than [REDACTED] remained in effect. Agreement of Merger, § [REDACTED] and [REDACTED]. The Third Agreement stated that the merger of [REDACTED] into [REDACTED] was intended to qualify as a tax-free liquidation under I.R.C. § 332. Under the terms of the merger, [REDACTED] succeeded to the obligations of [REDACTED]. The Certificate of Merger provided that the surviving corporation would be [REDACTED].

I.R.C. § 6213(a) provides restrictions on the assessment and collection of deficiencies. Generally, this section provides that a statutory notice of deficiency is a prerequisite to the Commissioner's assessment, and subsequent collection, of a tax deficiency. Subparagraph(b) of this Code section provides certain exceptions to this general rule. Specifically, I.R.C. § 6213(d) allows a taxpayer, at any time (whether or not a notice of deficiency has been issued) to waive, in writing, the above-described restrictions on assessment and collection. The regulations under this Code section do not specify who may sign such waivers; however the Service generally applies the same rules that are applicable to execution of the original returns to waivers and consents. A corporation's income tax return must be signed by the president, vice-president, treasurer, assistant treasurer, chief accounting officer or any other officer duly authorized to act. The fact that an individual's name is signed on the return is prima facie evidence that the individual is authorized to sign the return. Accordingly, any such officer may sign a consent, whether or not that person was the same individual who signed the return. See Rev. Rul. 83-41, 1983-1 C.B. 349, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305 (the Service will apply the rules applicable to the execution of the original returns to the execution of consents to extend the time to make assessments).

Generally, the common parent, with certain exceptions not applicable here, is the sole agent for each member of the group, duly authorized to act in its own name for all matters relating to the tax liability for the consolidated return year. Treas. Reg. § 1.1502-77(a). The common parent in its own name will give waivers, and any waiver so given, shall be considered as also

having been given or executed by each subsidiary. Treas. Reg. 1.1502-77(a). Thus, generally, the common parent is the proper party to sign waivers, including the Form 870 Waiver of Restrictions on Assessment and Collection, for all members in the group. Treas. Reg. § 1.1502-77(a). Treasury Regulation § 1.1502-77(c) provides that, unless the District Director agrees to the contrary, an agreement entered into by the common parent extending the time within which an assessment may be made in respect of the tax for a consolidated return year, shall be applicable to each corporation which was a member of the group during any part of such taxable year. The common parent and each subsidiary which was a member of the consolidated group during any part of the consolidated return year is severally liable for the tax for such year. Treas. Reg. § 1.1502-6(a).

Temp. Reg. §1.1502-77T provides exceptions to the general rule. Temp. Reg. §1.1502-77T provides for alternative agents in certain circumstances and applies to waivers of the statute of limitations for taxable years for which the due date (without extensions) of the consolidated return is after September 7, 1988. Therefore, the regulation is applicable in this case. Temp. Reg. §1.1503-77T provides that a waiver of the statute of limitations with respect to the consolidated group given by any one or more of the corporations referred to in paragraph (a)(4) of the section is deemed to be given by the agent of the group.

Subparagraph(a)(4)(i) lists as an alternative agent the common parent of the group for all or any part of the year to which the notice of waiver applies. In this case, the common parent, [REDACTED] was merged into [REDACTED] and is no longer in existence. Therefore, this paragraph does not apply.

Subparagraph(a)(4)(ii) lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. §381(a) applies. I.R.C. §381(a) applies, in part, to an acquisition of assets of a corporation by another corporation in a transfer to which I.R.C. §361 (relating to non recognition of gain or loss to corporations) applies, but only if the transfer is in connection with a reorganization described in subparagraph(A), (C), (D), (F) or (G) of I.R.C. §368(a)(1). According to the materials submitted, the common parent, [REDACTED] merged into [REDACTED] with [REDACTED] as the surviving corporation. If the merger is an "A" reorganization, I.R.C. §381 will apply to the merger. If so, pursuant to Temp. Reg. §1.1502-77T(4)(ii), [REDACTED] would be an alternative agent for the [REDACTED] consolidated group for the [REDACTED] tax year. Therefore, any waiver given by [REDACTED] with respect to the pre-merger year of the [REDACTED] consolidated group would be deemed to be given by the agent of the group (if [REDACTED] a Limited Liability Company, is not treated as a disregarded entity).

_____ then merged into _____ with _____ as the surviving corporation. The Merger Agreement stated that this merger was intended to qualify as a tax free liquidation under I.R.C. §332. I.R.C. §381 also applies to an acquisition of assets of a corporation by another corporation in a distribution to such other corporation in which I.R.C. §332 (relating to liquidation of subsidiaries) applies. Therefore, I.R.C. §381 will apply to the merger. It is uncertain, however, whether the scope of Temp. Reg. §1.1502-77(T)(4)(ii) (which lists as an alternative agent a successor to the former common parent in a transaction in which I.R.C. §381 applies) extends to an alternate agent for a successor to the former common parent in a transaction in which I.R.C. §381 applies. Accordingly, we do not believe it would be in the best interests of the government to rely upon this subparagraph in this case.

Subparagraph(a)(4)(iii) of Temp. Reg. §1.1502-77T lists as alternative agent the agent designated by the group under Treas. Reg. §1.1502-77(d). Treas. Reg. §1.1502-77(d) provides that if the common parent corporation dissolves, the common parent and/or the remaining members of the consolidated group may designate another member of the group to act as agent, subject to the approval of the District Director. In this case, there was no designation and, accordingly, subparagraph(a)(4)(iii) does not apply.

Subparagraph(a)(4)(iv) of Temp. Reg. §1.1502-77T lists as an alternative agent, the common parent of the group at the time the waiver is given if the group remains in existence under Treas. Reg. §1.1502-75(d)(2) or (3). In this case, there is no "F" reorganization or downstream transfer as described in Treas. Reg. §1.1503-75(d)(2) or reverse acquisition within the meaning of Treas. Reg. §1.1502-75(d)(3). Accordingly, subparagraph(iv) does not apply.

Since we have concluded that the subparagraphs of Temp. Reg. §1.1502-77T(4) do not apply or that we may not be able to rely on them in this case, there is no alternative agent for the _____ consolidated group.

On _____, _____ LLC merged with and into _____; _____ merged with and into _____; and _____ merged with and into _____. Each of the simultaneous mergers was pursuant to Massachusetts state law, and, in the case of the merger involving _____ and _____, Delaware law. As discussed below, _____ is liable as a successor under the Massachusetts merger law for the debts of _____ which in turn is liable under the Massachusetts merger law for the debts of _____. Therefore, _____ is primarily

liable for any and all debts of [REDACTED]. [REDACTED] is severally liable under Treas. Reg. § 1.1502-6 for the entire amount of [REDACTED]'s consolidated group's tax liability for those periods in which it was a member of the group. Thus, [REDACTED] is primarily liable under state law for [REDACTED]'s several liability for the entire amount of [REDACTED]'s consolidated group's tax liabilities for the taxable year [REDACTED].²

As set forth above, [REDACTED] is the successor in interest, after a series of mergers, to [REDACTED]. The surviving or resulting corporation in a merger or consolidation under state law may validly sign a waiver on behalf of the transferor (predecessor) corporation for a period before the transfer. Rev. Rul. 59-399, 1959-2 C.B. 448 (the surviving corporation may validly sign a consent to extend the period of limitations on assessment on behalf of the transferor for a period before the transfer).

Successor liability may be established in this case under Mass. Ann. Laws ch. 156B § 80(2000) which provides in part:

Effect of Consolidation or Merger.

...(5) all of the estate, property, rights, privileges, powers and franchises of the constituent corporations and all of their property, real, personal and mixed, and all the debts due on whatever account to any of them...shall be transferred to and vested in the resulting or surviving corporation...

(b) The rights of creditors of any constituent corporation shall not in any manner be impaired, nor shall any liability or obligation, including taxes due or to become due, or any claim or demand in any cause existing against such corporation, or any stockholder, director, or officer thereof, be released or impaired by any such consolidation or merger, but such resulting or surviving corporation shall be deemed to have assumed, and shall be liable for, all liabilities and obligations of each of the constituent corporations in the same

² A successor succeeds to all the primary liabilities of its predecessor, which would include that predecessor's own successor liability with regard to the liabilities of its predecessor. Here, [REDACTED] as successor to [REDACTED], succeeds to all the primary liabilities of its predecessor (i.e., [REDACTED], which would include that predecessor's own successor liability with regard to the liabilities of its predecessor (i.e., [REDACTED]).

manner and to the same extent as if such resulting or surviving corporation had itself incurred such liabilities or obligations....

Delaware General Corporation Law provides in part:

8 Del. C. § 259(1999): Status, rights, liabilities, of constituent and surviving or resulting corporations following merger or consolidation:

(a) When any merger or consolidation shall have become effective under this chapter... all rights of creditors and all liens upon any property of any said constituent corporation shall be preserved unimpaired, and all debts, liabilities and duties of the respective constituent corporations shall thenceforth attach to said surviving or resulting corporation, and may be enforced against it to the same extent as if said debts, liabilities and duties had been incurred or contracted by it.

The mergers of [REDACTED] with [REDACTED] LLC with [REDACTED] surviving, and the merger of [REDACTED] with and into [REDACTED] were pursuant to Massachusetts corporate law. The merger of [REDACTED] with and into [REDACTED], was pursuant to Massachusetts corporate law and Delaware General Corporation Law. Furthermore, if, as it appears, the merger of [REDACTED] into [REDACTED] [REDACTED] was effected under Delaware law, then [REDACTED] is primarily liable for [REDACTED]'s debts, including taxes due. Southern Pacific Transportation Co. v. Commissioner, 84 T.C. 387 (1985), later proceeding, 90 T.C. 771(1988).

Based on the foregoing discussion, we recommend that you obtain a Form 872 from [REDACTED]. We recommend the caption on the Form 872 read: "[REDACTED] (EIN: [REDACTED]), as successor in interest to [REDACTED] (EIN: [REDACTED]), successor to [REDACTED] (EIN: [REDACTED])". On the bottom of this Form 872, you should add the following: "This is with respect to the consolidated tax of the [REDACTED] consolidated group for its [REDACTED] taxable year." As previously noted, this Form 872 should be signed by an authorized officer or director of [REDACTED], analogous to the procedure set forth in Rev. Rul. 83-41, 1983-1 C.B. 399, clarified and amplified, Rev. Rul. 84-165, 1984-2 C.B. 305.

In addition, under I.R.C. §6901, [REDACTED] is a transferee at law of [REDACTED], while [REDACTED] is a transferee of a transferee by virtue of its receipt of the assets of [REDACTED] when said entity merged into it. A determination against the surviving corporation for tax due by the merged corporation for a

period prior to the merger is not generally handled as a transferee case, rather it should generally be handled by asserting primary liability against the surviving corporation. There is an exception if the statutory period for assessing a deficiency has expired under primary liability; the Service would then argue that the surviving corporation should be liable as a transferee. See generally CCDM(35)(10)61. Therefore, it is generally preferable to assert primary instead of transferee liability against the surviving corporation, [REDACTED] if the statutory period for assessing a deficiency has not expired under primary liability. However, because there is a transferee of a transferee in this case, we recommend that you obtain Forms 977(Consent to Extend the Time to Assess Liability at Law or in Equity for Income, Gift and Estate Tax Against Transferee or Fiduciary) and Form 2045(Transferee Agreement) from [REDACTED] in order to fully protect the government's interest. Please feel free to contact the undersigned if assistance is required in the preparation of the transferee forms.

As a final matter, we recommend that you pay strict attention to the rules set forth in the Internal Revenue Manual(IRM). Specifically, IRM 121.2.22.3 requires use of Letter 907(DO) to return the signed Form 872 to the taxpayer. Dated copies of both letter should be retained in the case file as directed. When the signed Form 872 is received from the taxpayer the authorized manager should promptly sign and date it in accordance with Treas. Reg. §301.6501(c)-1(d) and IRM 121.2.22.3. The manager must also update the statute of limitations in the continuous case management statute control file and properly annotate Form 895 or equivalent. See IRM 4531.2 and 4534. This includes Form 5348. In the even that Form 872 becomes separated from the file or lost, these other documents would become invaluable to establish the agreement.

Furthermore, please note that §3461 of the Restructuring and Reform Act of 1998, codified in I.R.C. §6501(c)(4)(B), requires the Internal Revenue Service to advise taxpayers of their right to refuse to extend the limitations on assessment, or in the alternative to limit an extension to particular issues or for specific periods of time, each time that the Internal Revenue Service requests that the taxpayer extend the limitations period. To satisfy the requirement, Publications 1035, "Extending the Tax Assessment Period," must be given when you solicit the statute extension.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as attorney client privilege. If

disclosure becomes necessary, please contact this office for our views. If we can be of any further assistance, the undersigned can be reached at 617-565-7855.

BARRY J. LATERMAN
Special Litigation Assistant